LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 219

Ref: LCRO 189/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [City] Standards Committee [X]
BETWEEN	**RT** Applicant
AND	**AC** Respondent

DECISION

The names and identifying details of the parties in this decision have been changed

Introduction

[1] Mr RT has applied for a review of the determination by [City] Standards Committee [X] in which the Committee made two findings of unsatisfactory conduct against Mr RT, ordered him to reduce his fee[1] and to pay costs in the sum of $1,500.

Background

[2] Mr and Mrs AC instructed Mr RT to act for them on the sale of their property in Parnell, the terms of which they had negotiated directly with the purchaser.

[1] From $5,950 to $2,800, excluding GST and disbursements.

[3] In his complaint to the Lawyers Complaints Service, Mr AC says:

> We would not sign our negotiated sale and purchase agreement until we had found another property to purchase.

[4] The agreement was signed by them on 15 March 2017. Mr and Mrs AC attended at Mr RT's office on the same day and instructed him to act for them.

[5] The sale price of the property was $8 million and provided for a deposit of $4 million. The agreement provided that settlement of the sale was to take place 12 months after the date of the agreement.

[6] Clause 20.2 of the agreement provided:

> The Purchaser shall pay the balance of the Deposit into the Vendor's bank account on the later of:
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> (a) three Working Days following the Execution Date; and
>
> (b) the date of receipt of a written undertaking from the Vendor's solicitor (to the Purchaser's solicitor) that they have obtained and are holding:
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> (i) the necessary Authority and Instruction Form signed by the Vendor (and appropriately witnessed) to enable the Vendor's solicitor to register the transfer of the Property to the Purchaser in Landonline on Settlement;
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> (ii) confirmation from the Vendor that it will not revoke the authorisations implicit in the Authority and Instruction Form; and
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> (iii) an unconditional and irrevocable instruction from the Vendor to settle the sale of the Property in accordance with this Agreement at such time as the Purchaser (or the Purchaser's solicitor) deposits the balance of the Purchase Price in the Vendor's solicitor's trust account.

[7] Mr and Mrs AC required Mr RT to provide the undertaking on the day they attended at his office, to enable them to make an offer to purchase a property at [Property Two].

[8] Mr RT prepared the required documents and had them signed by the ACs. He then prepared and signed the undertaking to be provided to the purchaser's solicitor. The letter of undertaking was delivered by the ACs directly to the purchaser's solicitor and the deposit was paid to them as provided for in the agreement.

[9] Mr RT did not render an account at that stage.

[10] Settlement of the [Property Two] property was scheduled for April 2017, and Mr RT sent a statement to the ACs which included the balance to settle, together with his fee, being $2,200 plus GST and disbursements.

[11] Subsequently, the ACs realized that renovations to the property would take longer than anticipated and decided to purchase a property in the meantime whilst renovations were completed. To do this they needed to borrow $750,000 from the bank.

[12] Before it would advance the loan, the bank required an assurance that the loan would be repaid from the proceeds of the final payment for the [Property One]. The ACs instructed Mr RT to provide an undertaking to this effect, and the bank made the required facility available.

[13] As the date for settlement of the sale approached, Mr RT turned his mind to the fee that he would charge for this transaction. He says he sought advice from several senior members of the profession, who, Mr RT says, suggested a fee in the range of $5,000 – $11,000.

[14] Mr RT contacted the ACs to discuss matters, and in the course of that conversation Mr AC asked Mr RT what his fee would be. Mr RT advised that he had not previously acted on the sale of a property in the region of $8 million and suggested a fee in the range of $8,000 – $11,000. This was rejected by the ACs. Mr RT asked Mr AC to come into his office to discuss the proposed fee, but he did not attend at the arranged time.

[15] Following that, Mr RT received an email from Mr JG, a partner of the firm [Law Firm AB], advising that he had been instructed by the ACs to act on the sale, and requesting to uplift the file.

[16] By that stage Mr RT had set up the Landonline e-dealing in preparation for settlement of the sale and transfer of the title to the new owners.

[17] Following termination of his instructions, Mr RT rendered his account – $5,950 plus GST and disbursements, a total of $6,857.50 and despite a number of requests for payment of his account the fee was (and has not been) paid.

Mr and Mrs AC's complaints

[18] Mr AC lodged his complaint with the Lawyers Complaints Service on 25 March 2018. The supplementary information provided by him records the background facts as set out above.

Fees

[19] Mr AC makes the point that Mr RT "was not involved in any way in the contract of the sale of [Property One]. All terms were negotiated between [them] and the purchasers before any of [Mr RT's] involvement".

[20] He says that Mr RT's only involvement initially was "in the writing of the letter" to the purchaser's solicitor, and that Mr RT's fee for this was $2,200 plus GST.

[21] He continues:

> *We were at this time surprised by this bill and received nothing that itemised his work.*

[22] Mr AC also complains about the fee rendered by Mr RT for the work undertaken with regard to the sale of the [Property One]. He says:[2]

> *I do not believe that the present bill from RT can be considered "fair and reasonable" under the Lawyers and Conveyancers Act.*

Letter to ANZ

[23] Mr AC's complaint relating to the provision of the undertaking by Mr RT to the bank,[3] is that, instead of sending the required undertaking, Mr RT had sent a copy of the undertaking delivered to the solicitor acting for the purchaser of the [Property One] in accordance with clause 20.2.(b) of the sale agreement.

[24] Mr AC says

> *I believe that sending such a letter was outside RT's authority.*

Mr RT's conduct

[25] After the ACs had informed Mr RT that they would not pay the fee he was suggesting and intended to instruct a new lawyer, they said Mr RT's "voice appeared flummoxed and he became aggressive".

Outcome sought

[26] The outcome of the complaint sought by Mr AC was:

> A letter of apology from RT apologising for his excessive behaviour. Compensation for the stress and time involved in challenging the behaviours and actions of RT; any legal costs for making the claim against RT.

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[2] Complaint form, Section 5.
[3] To repay the advance of $750,000 from the proceeds of sale of the [Property One].

The Standards Committee determination

[27] The Committee distilled the following issues out of Mr AC's complaint:[4]

(a) Whether it was appropriate that Mr RT provided ANZ with the letter dated 15 March 2017 addressed to the solicitors [T]hompson Blackie Biddles and/or did Mr RT breach a duty of confidence or any other professional obligation to Mr and Mrs AC in this respect;

(b) Whether Mr RT charged more than a fee that was fair and reasonable pursuant to rules 9 and 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC);

(c) Whether Mr RT discharged his professional obligations regarding the provision of information to clients (rr 1.6, 3.4, 3.5 of the RCCC) including:

- Whether Mr RT charged the ACs for services before he had failed to provide them with information in writing on the principal aspects of client service;

- Whether the disclosure that Mr RT provided in his terms of engagement was adequate (including the basis on which fees will be charged) to meet his professional obligations;

(d) Whether Mr RT engaged in conduct that was misleading and deceptive, or likely to mislead or deceive someone on any aspect of his practice (r 11.1 of the RCCC), with respect to the engagement letter, provision of information, and in relation to fees and disbursements;

(e) Whether Mr RT treated the ACs with integrity, respect and courtesy, including in relation to the termination of the retainer; (rr 3.1, 12 of the RCCC);

(f) Whether Mr RT asserted a proprietary interest in Mr and Mrs AC and exerted undue pressure on them not to terminate the retainer, or undue pressure on them to re-engage Mr RT after the termination; (r 4.4 of the RCCC);

(g) Whether Mr RT's conduct towards the ACs in relation to the retainer was a breach of any of his professional obligations under rules 4.3 and 4.4 of the RCCC, or any other rule or enactment.

The letter to ANZ

[28] Mr AC's complaint was that Mr RT had breached his duty of confidence to them by sending the bank the letter dated 15 March 2017 which had been delivered to the purchaser's solicitor instead of the required undertaking.

[29] Mr RT says that the only letter he sent to the ANZ was his letter of undertaking to repay the sum of $750,000 from the proceeds of sale of the [Property One].

[4] Standards Committee determination at [8].

[30] The Committee recorded its determination on this issue in the following manner:[5]

> It was not clear to the Committee, based on the information provided, what information had been sent and by whom. The Committee was not certain that ANZ received the 15 March 2017 letter addressed to [Law Firm XY] from Mr RT. In light of this factual dispute, together with the apparent uncertainty about exactly what information is recorded on the ANZ system, the Committee was of the view that there was insufficient evidence to say that it was Mr RT who sent the letter and breached his duty of confidence.

[31] The Committee determined to take no further action with regard to this complaint.

Fees

[32] At paragraphs [15] and [16] of its determination, the Committee said:

> Mr RT raised two invoices. The first amounted to $2,200 plus GST and related to the provision of a letter guaranteeing that Mr and Mrs AC would proceed to settlement in respect of the sale of [Property One].
>
> After securing the advance from ANZ Mr AC asked for a quote from Mr RT to act in the purchase of [Property Two]. Mr AC was unhappy with the quote, terminated the retainer, and transferred his instructions to [Law Firm AB]. Mr RT raised his second invoice for $6,857.50 in respect of providing the undertaking to ANZ and preliminary steps in respect of the purchase.

[33] The Committee engaged Mr [Assessor] to undertake a costs assessment. After a consideration of the report, the Committee said:

> 18. Mr [Assessor]'s report indicated that, in respect of the first invoice for $2,200, although it was on the high side it was not so high as to be considered unreasonable.
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> 19. In respect of the second bill for $5,950 plus GST, Mr [Assessor] noted that the time records showed that Mr RT had recorded 13 hours of time on this matter. I[n] Mr [Assessor]'s view this was unreasonable. He advised that the transaction was not complex and did not require the amount of time spent. Mr [Assessor] suggested that the invoice be reduced to $2,800 plus GST.
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> …
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> 21. The Committee was satisfied that the cost assessors report was accurate and reached reasonable conclusions regarding what would be appropriate fees for the work undertaken. The Committee accepted that 13 hours of time recorded in respect of the second invoice was excessive and considered that the fee ought to be reduced. Essentially, the Committee's view was that Mr RT had provided a brief letter to ANZ giving an undertaking and undertook some initial work in respect of the property transaction. The Committee could not see any evidence to support work done justifying the amount that had been charged.

[5] At [12].

[34] The Committee then determined that Mr RT's fee was not fair and reasonable and his conduct therefore constituted unsatisfactory conduct by reason of breaches of rr 9 and 9.1 of the Conduct and Client Care Rules.[6]

Provision of information

[35] The Committee addressed issues (c) and (d) together. It determined that Mr RT had met his obligations when providing his terms of engagement to the ACs. It then commented that the lack of time records did not assist, but had been addressed in the section relating to the reasonableness of Mr RT's fees.

[36] The Committee determined to take no further action with regard to these issues.

Misleading and deceptive conduct

[37] The Committee stated that this issue "related to general conversations between the parties during the course of the retainer".[7] In the absence of any corroborating evidence for either party's view, the Committee determined to take no further action with regard to this complaint.

Rules 3.1 and 12 – Conduct and Client Care Rules[8]

[38] At paragraphs [31] and [34] of its determination the Committee said:

> Mr RT says that he was conscious of his responsibility arising from the unconditional and irrevocable authority given by Mr and Mrs AC to complete the sale, and the undertakings given to complete the sale and to fulfil the undertaking given to ANZ. He denies that, at any stage, he treated the ACs with a lack of integrity respect and courtesy.
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> …
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> … [The ACs] said Mr RT continued to believe that he was the only person who could settle on their behalf and that he could not be relieved of this undertaking.

[39] Mr RT reacted to the advice by the ACs that Mr JG had indicated his fee for the sale would be $1,200 for the work undertaken by Mr RT, and said that a complaint against Mr JG should be made.

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[6] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[7] Above n 5, at [28].
[8] Duty to act competently and in a timely manner, and to treat a client with respect and courtesy.

[40] The issue addressed by the Committee was:

> Whether Mr RT asserted a proprietary interest in Mr and Mrs AC and exerted undue pressure on them not to terminate the retainer, or undue pressure on them to re-engage Mr RT after the termination; (r 4.4 of the RCCC);

[41] The Committee expressed concern about Mr RT's reaction to the termination of his retainer.

[42] It said:[9]

> The Committee's view was that the appropriate and usual approach to take [in] this situation would be to advise the client that a new lawyer should be instructed to give undertakings in similar terms to those of the previous lawyer. Mr RT would then be released from the terms of the undertaking he had given. This would have avoided any inconvenience to Mr AC and any feelings he had of improper pressure being applied.

[43] The Committee noted that the matter was ultimately resolved after Mr RT took advice from the Law Society, and determined to take no further action with regard to this issue.

Professional obligations

[44] The Committee considered Mr RT's obligations pursuant to rr 4.3 and 4.4, which establish a client's right to terminate a retainer and a lawyer's obligation to facilitate the transfer of instructions to the new lawyer. It said:[10]

> Prior to Mr AC transferring instructions, Mr RT set up an e-dealing in respect of the purchase of the property. Following the transfer of instructions, [Law Firm AB] asked for access to the e-dealing. It appears that Mr RT refused the request and so [Law Firm AB] were forced to arrange for a new e-dealing to be created.
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> The e-dealing was in place to facilitate the purchase and Mr RT had been paid for the work he had undertaken. It seems that Mr RT's actions required procedural steps to be repeated unnecessarily.
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> The Committee was particularly concerned with Mr RT's refusal to facilitate a smooth transfer of the retainer. Mr RT's apparent belief that the ACs were contracted to him and unable to change lawyers was misguided.

[45] The Committee then determined that Mr RT had breached the Rules and his conduct amounted to unsatisfactory conduct.

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[9] At [37].
[10] At [39]–[41].

Orders

[46] Having made two findings of unsatisfactory conduct against Mr RT, the Committee made the following orders:

> (a) Mr RT is ordered, pursuant to s 156(1)(e) of the Act, to reduce his fee in respect of the second invoice from $5,950 plus GST of $892.50 (total $6,857.50) to $2,800 plus GST and disbursement of $435 (total $3,235) and to refund to Mr AC and Mrs AC the sum of $3,637.50 pursuant to s 156(1)(g) of the Act.
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> (b) Mr RT is ordered, pursuant to s 156(1)(i) of the Act, to pay to the New Zealand Law Society a fine in the amount of $5,000.
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> (c) Mr RT is ordered, pursuant to s 156(1)(n) of the Act, to pay to the New Zealand Law Society costs and expenses incidental to the inquiry and the hearing on the papers, in the amount of $1,500.

Mr RT's application for review

[47] Mr RT has applied for a review of the Committee's decision. He "contends that there are material findings of fact in the background to the determination of Standards Committee 3 … which are erroneous". In this regard, he refers to errors in paragraphs 15 and 16 of the determination, which will be referred to in the Review section of this decision.

[48] Mr RT submits these errors are compounded when the Committee addressed the complaint about fees. He says that he sought guidance from senior practitioners as to what level of fee would be appropriate and observes that the costs assessor took no account of the views of these practitioners.

[49] Mr RT reiterates that his attempts to discuss the fee with his clients were rejected, noting that he did not render an account until being contacted by the lawyer whom the ACs had instructed to complete their transaction.

[50] At all times, Mr RT indicated he would be happy to cooperate with a mediation undertaken through the auspices of the New Zealand Law Society, but these proposals were also rejected.

[51] Mr RT notes that the Standards Committee determination relating to fees adopts the recommendations of the costs assessor. He disputes the assessment of time for each matter and refers to the factors[11] to be taken into account when determining what would amount to a fair and reasonable fee.

[11] Rule 9.1 – Conduct and Client Care Rules.

[52] Mr RT considers the costs assessment to be flawed. The detail of Mr RT's submissions will be addressed in the Review section of this decision.

[53] With regard to the comments made by the Committee about him asserting "a proprietary interest" in the ACs, Mr RT refers to the undertakings that he had provided to the purchaser's solicitor and the ANZ, relying upon the irrevocable instructions he had received from the ACs.

[54] Mr RT has provided a copy of a letter from [Law Firm AB],[12] in which Mr B advises that no estimates were given to the ACs with regard to the sale ($1,200 as asserted by the ACs). Mr B advises that the firm had acted for the ACs in a previous purchase, for which their fee had been $1,200, and speculates that the ACs had used this as the basis for their statements to the Lawyers Complaints Service.

[55] With regard to the comments that Mr RT had not cooperated with the handover to Mr JG by declining to transfer the e-dealing to [Law Firm AB], Mr RT submits that this is not possible.

[56] Finally, he submits that the quantum of the fine needs to be addressed, depending on the outcome of this review.

Progress of review

[57] A hearing took place with Mr RT in Auckland on 5 November 2020. Mr AC did not exercise his right to attend, either in person or by other means.[13]

Review

Fees

[58] Mr AC's central complaint relates to Mr RT's fees and it was the proposed fee for acting on the sale of the [Property One] that prompted Mr AC and his wife to terminate Mr RT's instructions.

[59] Mr RT had indicated, both before and after the complaint, that he was prepared to enter into mediation with the ACs under the auspices of the New Zealand Law Society. Section 143 of the Lawyers and Conveyancers Act 2006 gives a Standards Committee the option of directing the parties to explore the possibility of resolving complaints by mediation. There is, however, no provision in the Act whereby the Complaints Service

[12] Letter [Firm AB] to RT 1 May 2018.
[13] By telephone or audio-visual means.

can be actively involved in any form of negotiation and/or mediation, and any direction to do so, would have to be undertaken by the parties themselves.

[60] Given the antipathy that had arisen between the ACs and Mr RT, and the fact that a new lawyer had been engaged, the time for this option to be useful had passed. Similarly, by the time the issues reached this Office, all possibility of resolving matters in this way had also long passed.

Mr [Assessor]'s report

[61] The Committee engaged the services of Mr [Assessor] to independently assess Mr RT's fees and to report to the Committee.

[62] Mr [Assessor]'s report was provided after reviewing Mr RT's files but he did "not derive a great deal of assistance from the data in undertaking the assessment and determining whether or not the fees were 'fair and reasonable'".[14] Mr RT does not keep time records.

[63] Mr [Assessor] considered both invoices rendered by Mr RT – the fee relating to the purchase of the [Property Two] property and the sale of the [Property One], which included the two undertakings provided by Mr RT.

Fee 1 – $2,200

[64] Prior to the settlement of the purchase of the [Property Two] property, Mr RT sent a statement to Mr and Mrs AC. This statement was made up of the sum required to settle the purchase in accordance with the settlement statement provided by the vendor's solicitor and Mr RT's fee of $2,200 plus GST and disbursements. Mr RT provided a separate invoice for his fee.

[65] This invoice included the detail of the work carried out by Mr RT and follows the usual format used by conveyancing practitioners. It would seem that Mr AC has not referred to this invoice when making his complaint that they had "received nothing that itemised his work".

[66] Mr AC says the fee of $2,200 related only to the provision of the undertaking to the solicitor for the purchaser of the [Property One], which he describes as the "writing of a letter".

[14] [Assessor] report (21 November 2018) at 16.

[67] In this regard, Mr [Assessor] says:[15]

> This was a misapprehension on the Complainant's part. The bill referred to was for the purchase of the [Property Two] property and had nothing to do with the sale of the [Property one] property.

[68] He says:[16]

> Having reviewed Mr RT's file for the first bill, I consider that the fee was on the high side, but was still reasonable.

[69] At this point, it is relevant to refer to the comment by the LCRO in *Hunstanton v Camborne*[17], where he observes:

> …there is a proper reluctance to "tinker" with bills by adjusting them by small amounts.

[70] The determination of the Standards Committee is confirmed.

Fee 2 – $5,950

[71] The initial observation to make when considering Mr RT's second invoice, is that he frankly acknowledged to his clients that he had not acted in a transaction involving the sale of a property of similar value before, and proactively sought to discuss and agree his fee with his clients. His attempts to do so were rebuffed.

[72] Mr RT does not keep time records. There is no obligation to do so, but it is a costing tool that has been adopted by the majority of practitioners. Mr RT's terms of engagement refer to his hourly rate and the time and labour expended, as factors to be considered when reaching a view as to what constitutes a fair and reasonable fee. Without time records, Mr RT is unable to verify the time that he has expended on this matter.

[73] Mr RT estimated he had spent four to five hours reviewing the agreement for sale and purchase, and preparing and having signed, all the documents required to enable him to provide the required undertaking to the purchaser's solicitor to satisfy the preconditions to payment of the deposit.

[74] Mr RT then estimates he had spent 13 hours subsequently until termination of the retainer.

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[15] At 8.
[16] At 33.
[17] LCRO 167/2009 (10 February 2010) at [62].

[75] Mr [Assessor] says:[18]

> The information provided by Mr RT about the time, responsibility and urgency of the initial attendance and the arrangements for the release of the deposit are credible. But the statement that the remainder of the attendances up to the termination of the retainer required 13 hours of professional time for what was a straightforward conveyancing transaction with no mortgage documentation or other complexity is simply not credible. Account has been taken of the giving of the undertaking to ANZ Bank to repay the loan from the proceeds of settlement, but even allowing for that, 13 hours to complete the transaction is well outside anything that could be anticipated or that was actually performed by Mr RT.

[76] Mr [Assessor]'s assessment of a fair and reasonable fee for the work carried out by Mr RT, is based on what he considers would have been the time Mr RT would have expended on the file, multiplied by Mr RT's hourly rate. The fee arrived at by Mr [Assessor] in this manner, as being a fair and reasonable fee, is $2,800.

[77] This assessment was accepted by the Standards Committee, which then made a finding of unsatisfactory conduct against Mr RT for a breach of r 9, and ordered him to reduce his fee to the amount assessed by Mr [Assessor].

[78] To proceed on this basis ignores the comments made in various judgments delivered by the Courts and I include here an extensive extract from the decision of the Legal Complaints Review Officer in *Hunstanton v Camborne*:[19]

> [21] It is also the case that a fair and reasonable fee is not simply an arithmetical calculation based on time. This was noted both by Mr Burcher in his report, and by the Law Society in their submissions. New Zealand courts have adopted the approach of Donaldson J in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441-442 (adopted in *Gallagher v Dobson* [1993] 3 NZLR 611). The relevant passage warrants reproduction at length:
>
> > The object of the exercise … is to arrive at a sum which is fair and reasonable, having regard to all the circumstances and, in particular, to the matters specified in the numbered paragraphs of part 2 of the order. It is an exercise in assessment, an exercise in balanced judgment - not an arithmetical calculation. It follows that different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow. It also follows that it is wrong always to start by assessing the direct and indirect expense to the solicitor, represented by the time spent on the business. This must always be taken into account, but it is not necessarily, or even usually, a basic factor to which all others are related. Thus, although the labour involved will usually be directly related to, and reflected by, the time spent, the skill and specialised knowledge involved may vary greatly for different parts of that time. Again not all time spent on a transaction necessarily lends itself to being recorded, although the fullest possible records should be kept. This error is compounded if, as an invariable rule, the figure representing the expense of recorded time spent on the transaction is multiplied by another figure to reflect the other factors. The

[18] At 34.
[19] Above n 17 at [21].

> present case provides an illustration of this error. … In my judgment the proper approach is to start by taking a broad look at 'all the circumstances of the case' and in particular the general nature of the business. This should be followed by a systematic consideration of the factors specified in the paragraphs of art 2 of the order.

[79] The decision of the Committee is based solely on Mr [Assessor]'s estimate of time expended by Mr RT on this transaction.

[80] The elements of this particular transaction which are relevant to this discussion are:

- Mr RT was presented with an agreement which included three pages of closely worded special terms. He had not been involved in negotiating the sale and was required to peruse and understand the terms of the agreement which contained unusual terms.

- Payment of the deposit by the purchaser was extremely important to the ACs and Mr RT was required to act urgently to achieve that. To do so he was required to prepare, and have signed, irrevocable instructions from the ACs, and the land transfer documents. He then provided the undertaking to the purchaser's solicitor. In effect, Mr RT needed to be in a position to settle the transaction in 12 months' time and to complete all documentation which, would usually take place over the period of time between an agreement being received, and settlement.

- The giving of an undertaking requires extreme care by a lawyer to be absolutely sure that it can be performed. If an undertaking is breached, a lawyer will face disciplinary consequences.

- The transaction was extremely unusual in that one half of the sale price was being paid as a deposit, with the balance to be paid in 12 months' time.

- Subsequently, Mr RT was asked to provide the ANZ bank with an undertaking to pay $750,000 to the bank from the proceeds of sale. Access to the bank advance facility was critical to the ACs as it enabled them to purchase another property pending completion of renovations to the [Property Two] property.

- The sale price of the property was significant.

[81] Mr RT says he consulted several senior members of the profession to ascertain their views as to what would constitute a fair and reasonable fee. Some of the persons

referred to are certainly well regarded in the legal profession. Unfortunately, Mr RT has not provided anything in writing from these lawyers to corroborate his claims.

[82] Overall, Mr [Assessor]'s recommendation of a fair and reasonable fee for this transaction ($2,800) is not far removed from the fee he considers was acceptable for the purchase of the [Property Two] property ($2,200). The two recommendations are difficult to reconcile.

[83] For the above reasons, I do not consider the determination of the Committee to accept Mr [Assessor]'s report is well founded.

[84] The major factor which stands out, is that the sale price of the property was significant. Mr RT endeavoured to have a conversation with the ACs to discuss and agree a reasonable fee. Mr RT's approaches were rejected, followed immediately by a withdrawal of his instructions. This action constituted a breach by the ACs of their "irrevocable instructions".

[85] What constitutes a fair and reasonable fee in these present circumstances remains undecided. In this situation, the course of action which is often followed by this Office is to refer the matter back to the Standards Committee to obtain another costs assessment and to reconsider its decision.

[86] Such a course of action is not warranted in this situation. Through no fault of either party it is now approaching three years since Mr AC made his complaint. Mr RT has not been paid anything for his services. The applicants declined to have a discussion with Mr RT about his fee.

[87] Reverting to the direction of the Courts, "the proper approach is to start by taking a broad look at all the circumstances of the case…." When considering the 'particular circumstances of this case', referred to in [80] above, and particularly the relationship of the fee invoiced by Mr RT to the sale price of the property, I reach the view that Mr RT's fee is, in all the circumstances, fair and reasonable, (notwithstanding that he too, would appear to have applied an arithmetical calculation to arrive at his fee.[20])

[88] The finding of unsatisfactory conduct with regard to this matter is reversed.

[20] Mr RT says he has spent 17 hours on this transaction. His hourly rate was $350.

Disbursements

[89] There has been no substantive discussion by either Mr [Assessor] or the Standards Committee about the amount of disbursements charged by Mr RT. Mr RT's invoice included $260 by way of disbursements.

Mr [Assessor] recommended the fee of $15 for disbursements.

The Committee included $435 for disbursements in its order.

[90] I cannot reconcile these figures without reference to the file and the amounts involved do not warrant spending further time on this matter.

[91] The amount included in Mr RT's invoice is accepted.

Mr RT's reaction to termination of instructions

[92] Issues (f) and (g) addressed by the Standards Committee relate to Mr RT's conduct following termination of his instructions. These are:

> (f) Whether Mr RT asserted a proprietary interest in Mr and Mrs AC and exerted undue pressure on them not to terminate the retainer, or undue pressure on them to re-engage Mr RT after the termination; (r 4.4 of the RCCC);
>
> (g) Whether Mr RT's conduct towards the ACs in relation to the retainer was a breach of any of his professional obligations under rules 4.3 and 4.4 of the RCCC, or any other rule or enactment.

[93] Mr AC complained that after they had told Mr RT they were terminating his instructions, Mr RT told them that they could not "change lawyers because of [their] undertaking to him. His voice appeared flummoxed and he became aggressive". In an email to Mr [Assessor],[21] Mr AC says:

> Following Mr RT's release from acting on our behalf, he threatened us saying that we had to pay him and that we could not go to any other solicitors.

[94] The Committee considered this complaint in the context of r 4.4. It is appropriate to include the whole of that rule, including sub paragraphs here:

> 4.4 A lawyer has no proprietary interest in a client and must not exert undue pressure on a client not to terminate a retainer or to re-engage the lawyer after termination of the retainer.
>
> 4.4.1 Subject to any statutory provisions to the contrary, upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents, records, funds, or property held on

[21] Mr AC, email to Mr [Assessor] (31 October 2018).

> the client's behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien that the former lawyer may claim.
>
> 4.4.2 If the matter in issue is urgent, the former lawyer who holds a lien over documents must make the documents available to the client's new lawyer on receipt of an undertaking from the new lawyer that the former lawyer's fee will be paid in priority to the fee of the new lawyer.
>
> 4.4.3 Where a client changes lawyers, and funds, documents, or property of the former client are the subject of an undertaking given by the former lawyer to a third party, the former lawyer may decline to release the funds, documents, or property concerned to the new lawyer or client until the former lawyer is discharged from the undertaking to the third party.
>
> 4.4.4 Subject to the former lawyer's legal right to a lien, the interests of the client must be foremost in facilitating the transfer of the client's documents and records.

[95] Mr AC and his wife had provided an irrevocable and unconditional undertaking to Mr RT in the following terms:

> RE: SALE OF [Property One], [CITY] TO [LMN] LIMITED
>
> We irrevocably and unconditionally undertake:
>
> 1. not to revoke the authorizations implicit in the Authority and Instruction Form and
>
> 2. to settle the sale of the property in accordance with the Agreement at such time as the purchaser (or the purchaser's solicitor) deposits the balance of the purchase price in the vendor's solicitor's trust account.
>
> Signed by AC
>
> Signed by AC
>
> Dated 15th March 2017

This followed the form of the preconditions to payment of the deposit set out in cl 20.2(b) of the Agreement for Sale and Purchase.

[96] Having received these instructions, Mr RT provided the necessary undertaking to the purchaser's solicitor.

[97] It is understandable that Mr RT may have been 'flummoxed' when Mr AC advised him that they were terminating his instructions. This was in direct contravention of the undertaking they had provided to him. He may very well have been somewhat forceful in reminding the ACs of their undertaking. The ACs regarded this as aggressive behaviour on his part. Mr RT contests that he was rude, bullying or threatening.

[98] The Committee's determination to take no further action on this issue is confirmed.

[99] Related to this issue, is the fact that Mr RT had declined to comply with a request by Mr JG to provide him with access to the e-dealing which Mr RT had set up to effect this transfer of the property to the purchaser following settlement.

[100] The Committee has said:[22]

> The Committee was particularly concerned with Mr RT's refusal to facilitate a smooth transfer of the retainer. Mr RT's apparent belief that the ACs were contracted to him and unable to change lawyers was misguided.

[101] Mr RT was not misguided and nor was his belief that the applicant could not change lawyers "apparent". His views were founded on the fact that he had been irrevocably and unconditionally instructed to complete the sale.

[102] The Committee has made a finding of unsatisfactory conduct against Mr RT for being "obstructive and not serv[ing] the best interests of his former clients."[23]

[103] The Authority and Instruction Form necessary to complete the e-dealing would have been addressed to Mr RT. The procedure for giving another lawyer access to an e-dealing is not clear. It would have been more pragmatic for Mr JG to obtain new Authority and Instruction forms and to set up a new e-dealing. It would seem this is what occurred.

[104] Other than not providing Mr JG with 'access' to the e-dealing, there does not seem to be any other reason provided by the Committee for the finding against Mr RT. I do not consider the adverse finding to be warranted.

The undertaking to ANZ

Mr RT was instructed by the ACs to provide an undertaking to the ANZ to pay the sum of $750,000 to the bank from the proceeds of sale. They complain that instead, Mr RT sent the bank the undertaking he had provided to the purchaser's solicitor and that this amounted to a breach of their privacy. It is difficult to accept that by sending this letter to the bank, the bank was being informed of anything it did not already know. To obtain the loan from the bank, the ACs themselves would have needed to advise the bank that the [Property One] was due to settle and that they would be able to repay the bank from those funds. The bank sought an undertaking from Mr RT.

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[22] At [41].
[23] At [42]

[105] The bank released Mr RT from his undertaking when it received a replacement undertaking from Mr JG.

[106] At paragraph [12] of its determination the Committee says:

> It was not clear to the Committee, based on the information provided, what information had been sent and by whom. The Committee was not certain that ANZ received the 15 March 2017 letter addressed to [Law Firm XY] from Mr RT. In light of this factual dispute, together with the apparent uncertainty about exactly what information is recorded on the ANZ system, the Committee was of the view that there was insufficient evidence to say that it was Mr RT who sent the letter and breached his duty of confidence.

[107] I agree. The determination of the Committee to take no further action with regard to this issue is confirmed.

Decision

[108] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the findings of unsatisfactory conduct against Mr RT are reversed. Having reversed these findings, the orders made by the Committee fall away.

Mr RT's invoice dated 9 March 2018 is due and payable by Mr and Mrs AC.

DATED this 30TH day of NOVEMBER 2020

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O Vaughan
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr RT as the Applicant
Mr AC as the Respondent
[City] Standards Committee [X]
New Zealand Law Society